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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 JASON JONES,

10 Petitioner,

Case No. 2:16-cv-00342-MMD-VCF

11 ORDER

12 v.

13 BRIAN WILLIAMS, et al.,

14 Respondents.

15 Before the Court is respondents' motion to dismiss. (ECF No. 7.) Petitioner has
16 not filed a response, even though the Court granted his request for additional time to file
17 a response.

18 Respondents first argue that the action is untimely. The Court agrees. Congress
19 has limited the time in which a person can petition for a writ of habeas corpus pursuant
20 to 28 U.S.C. § 2254:

21 A 1-year period of limitation shall apply to an application for a writ of habeas
22 corpus by a person in custody pursuant to the judgment of a State court.
23 The limitation period shall run from the latest of—
24 (A) the date on which the judgment became final by the conclusion of direct
25 review or the expiration of the time for seeking such review;
26 (B) the date on which the impediment to filing an application created by
27 State action in violation of the Constitution or laws of the United States is
28 removed, if the applicant was prevented from filing by such State action;
29 (C) the date on which the constitutional right asserted was initially
30 recognized by the Supreme Court, if the right has been newly recognized
31 by the Supreme Court and made retroactively applicable to cases on
32 collateral review; or
33 (D) the date on which the factual predicate of the claim or claims presented
34 could have been discovered through the exercise of due diligence.

1 28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the
2 Supreme Court of the United States denies a petition for a writ of certiorari or when the
3 time to petition for a writ of certiorari expires. *Jimenez v. Quarterman*, 555 U.S. 113, 119-
4 20 (2009). See also Sup. Ct. R. 13(1). If the judgment is not appealed, then it becomes
5 final thirty (30) days after entry, when the time to appeal to the Nevada Supreme Court
6 has expired. See *Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012). See also Nev. R.
7 App. P. 4(b), 26(a). Any time spent pursuing a properly filed application for state post-
8 conviction review or other collateral review does not count toward this one-year limitation
9 period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-conviction
10 judgment becomes final upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d
11 1013, 1015 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not “properly
12 filed” and does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408, 417
13 (2005).

14 After a jury trial in state district court, petitioner was convicted of second-degree
15 murder with the use of a deadly weapon. Judgment of conviction was entered on April 29,
16 2013. (Exh. 47 (ECF No. 12-7).) Petitioner appealed. On April 25, 2014, the Nevada
17 Supreme Court reversed and remanded for a new trial because it held that the state
18 district court had erred in refusing a proposed jury instruction on voluntary manslaughter.
19 (Exh. 60 (ECF No. 12-20).) Back in state district court, petitioner agreed to plead guilty to
20 voluntary manslaughter with the use of a deadly weapon. (Exh. 70 (ECF No. 13-11).)
21 Judgment of conviction was entered on October 3, 2014. (Exh. 72 (ECF No. 13-13).)
22 Petitioner did not appeal. For the purposes of § 2244(d)(1), the judgment of conviction
23 became final on November 3, 2014, taking into account that it otherwise would have
24 become final on a Sunday.

25 On August 24, 2015, the clerk of the state district court received from petitioner a
26 motion to modify and/or correct illegal sentence. The clerk of the state district court did
27 not mark the motion as filed until October 29, 2015. (Exh. 78 (ECF No. 13-19).) On
28 September 8, 2015, petitioner filed a reply to the opposition to the motion to modify and/or

1 correct illegal sentence, even though no opposition had been filed. (Exh. 75 (ECF No. 13-
2 16).) On December 18, 2015, the state district court denied the motion, stating that
3 petitioner had no grounds. (Exh. 83 (ECF No. 14-3).) The time to appeal the denial of that
4 motion expired on January 19, 2016, taking into account that the deadline otherwise
5 would have fallen on a Sunday and then on the birthday of Martin Luther King, Jr.

6 A properly filed motion to modify or correct an illegal sentence qualifies for tolling
7 under 28 U.S.C. § 2244(d)(2). *Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001). The question
8 is when petitioner's illegal-sentence motion was properly filed.

9 An application is "filed," as that term is commonly understood, when it is
10 delivered to, and accepted by, the appropriate court officer for placement
11 into the official record. And an application is "properly filed" when its delivery
12 and acceptance are in compliance with the applicable laws and rules
governing filings. These usually prescribe, for example, the form of the
document, the time limits upon its delivery, the court and office in which it
must be lodged, and the requisite filing fee.

13 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (citations and footnote omitted). The clerk of a state
14 district court has the ministerial duty to accept and file a document presented for filing if
15 that document is in proper form, unless the state district court has specifically directed the
16 clerk to the contrary. *Sullivan v. Eighth Judicial Dist. Court*, 904 P.2d 1039, 1042 (Nev.
17 1995); *Bowman v. Eighth Judicial Dist. Court*, 728 P.2d 433, 435 (Nev. 1986). If the clerk
18 of the state district court cannot immediately file a document, then the clerk cannot return
19 the document. Instead, the clerk must mark the document as received and keep it in the
20 record of the case. *Whitman v. Whitman*, 840 P.2d 1232 (Nev. 1992).

21 The Court does not know why the illegal-sentence motion was not filed for more
22 than two months after receipt. Nothing appears to be wrong with the form of the illegal-
23 sentence motion. Petitioner filled in the blanks on a photocopied form that this Court has
24 seen many times before. No reason for the clerk not to file the motion immediately
25 appears to exist. Rule 3.70 of the Eighth Judicial District Court instructs the clerk of the
court not to file a proper-person motion when the person is represented by counsel of
record. However, trial counsel formally withdrew four days before the illegal-sentence
28 motion was received. (Exh. 74 (ECF No. 13-15).) Trial counsel's representation of

1 petitioner effectively ended much earlier, when the time to appeal the judgment of
2 conviction expired. For the purposes of 28 U.S.C. § 2244(d)(2), the illegal-sentence
3 motion was filed on August 24, 2015.

4 The Court also finds that the illegal-sentence motion was a *properly filed* motion
5 that qualified it for tolling. Respondents argue that the motion does not qualify for tolling
6 because the state district court ruled that petitioner had no grounds. The Court is not
7 persuaded. Despite the state district court's statement that petitioner had no grounds, this
8 court cannot take that statement literally. Petitioner did present a ground for relief, that
9 the minimum term he received for the use of a deadly weapon exceeded what Nev. Rev.
10 Stat. § 193.165 allowed. (Exh. 78, at 4-7 (ECF No. 13-19).) The response argued that
11 petitioner's sentence was allowed by the statute. (See Exh. 81 (ECF No. 14-1).) This
12 Court assumes that the state district court was holding that petitioner's arguments
13 provided no basis for relief. Furthermore, "the question whether an application has been
14 'properly filed' is quite separate from the question whether the claims contained in the
15 application are meritorious and free of procedural bar." *Bennett*, 531 U.S. at 9. The state
16 district court's ruling that petitioner had no grounds was a ruling on the merits, not on
17 whether it was properly filed. Petitioner complied with the requirements for filing an illegal-
18 sentence motion, and that is sufficient for tolling under § 2244(d)(2). The one-year period
19 of 28 U.S.C. § 2244(d)(1) was tolled from August 24, 2015, through January 19, 2016.

20 On October 26, 2015, petitioner filed a post-conviction habeas corpus petition in
21 the state district court. (Exh. 77 (ECF No. 13-18).) On February 9, 2016, the state district
22 court entered an order denying the petition as untimely under Nev. Rev. Stat. § 34.726(1).
23 (Exh. 87 (ECF No. 14-7).) On February 16, 2016, the state district court issued a notice
24 of entry of the order denying the petition. (Exh. 89 (ECF No. 14-9).) The issuance of the
25 notice of entry started the thirty-day period for appealing the state district court's decision.
26 Nev. Rev. Stat. § 34.575(1). On February 22, 2016, petitioner filed an opposition to finding
27 of facts, conclusion of law and order. (Exh. 90 (ECF No. 14-10).) Petitioner did not file a
28 notice of appeal within the thirty-day period.

1 In its order directing respondents to file a response, the Court questioned what the
 2 effect of the opposition to the state district court's order was. (ECF No. 6 at 2-3.) If the
 3 opposition had no effect upon the continuation of the state habeas corpus proceedings,
 4 then those proceedings have concluded, and the state district court's determination that
 5 the petition was untimely is final. Consequently, the state habeas corpus petition was not
 6 properly filed and was not eligible for tolling under 28 U.S.C. § 2244(d)(2). *Pace*, 544 U.S.
 7 at 417. If the opposition to the state district court's order did keep the state habeas corpus
 8 proceedings open, then there was a possibility that either the state district court or an
 9 appellate court might determine that the state habeas corpus petition was timely. If that
 10 occurred, then the state habeas corpus petition was timely filed and was eligible for tolling
 11 under 28 U.S.C. § 2244(d)(2).

12 Respondents have demonstrated to the Court's satisfaction that the opposition to
 13 the state district court's order has no effect and that the state habeas corpus proceedings
 14 have concluded. The only filing that will keep state habeas corpus proceedings open is a
 15 notice of appeal filed within thirty days of the notice of entry of the final order, in
 16 compliance with Nev. Rev. Stat. § 34.575(1). Rule 4(a)(4) of the Nevada Rules of
 17 Appellate Procedure, which allows for an extension of time to file a notice of appeal to
 18 thirty (30) days after entry of an order disposing of certain post-judgment motions, is not
 19 applicable to state habeas corpus petitions. *Klein v. Warden*, 43 P.3d 1029, 1032-33
 20 (2002).¹ Petitioner's state habeas corpus proceedings concluded with the expiration of
 21 the time to file a notice of appeal under Nev. Rev. Stat. § 34.575(1). The determination
 22 that the state habeas corpus petition was untimely is final. The state habeas corpus
 23 petition was not properly filed and did not toll the federal period of limitation.

24 Petitioner effectively commenced this action on February 16, 2016, when he
 25 mailed his original federal habeas corpus petition to this court. (ECF No. 3.) The Court
 26 noted in its first order that the petition was defective because petitioner did not allege any

27 ¹When the Nevada Supreme Court decided *Klein*, the rule then was known as Rule
 28 4(a)(2).

1 grounds for relief. Instead, petitioner stated only that the petition was a protective petition
2 under *Pace v. DiGuglielmo*. The Court directed petitioner to file an amended petition in
3 which he alleged his grounds for relief. (ECF No. 2, at 1-2.) Petitioner mailed his amended
4 petition to this Court on May 25, 2016. (ECF No. 5.)

5 When the Court directed a response to the amended petition, noting that it
6 appeared to be untimely, the Court did not account for petitioner's illegal-sentence motion.
7 The illegal-sentence motion changes the court's calculations, but the ultimate outcome
8 still is that the amended petition is untimely. Between the finality of the judgment of
9 conviction on November 3, 2014, and the state district court's receipt of the illegal-
10 sentence motion on August 24, 2015, two hundred ninety-four (294) days passed. The
11 illegal-sentence motion tolled the federal one-year period under 28 U.S.C. § 2244(d)(2)
12 while it was pending. The tolling ended on January 19, 2016, when the time to appeal the
13 denial of the illegal-sentence motion expired, and the one-year federal period resumed
14 running the next day. The state habeas corpus petition was ineligible for tolling under 28
15 U.S.C. § 2244(d)(2) because it was untimely. *Pace*, 544 U.S. at 417. Between the end of
16 the illegal-sentence motion and the mailing of the amended petition on May 25, 2016,
17 another one hundred twenty-seven (127) days passed. A total of four hundred twenty-
18 one (421) non-ttolled days have passed between the finality of the judgment of conviction
19 and the mailing of the amended petition, and that exceeds the one-year allowed under 28
20 U.S.C. § 2244(d)(1).

21 The mailing of the original federal habeas corpus petition on February 16, 2016,
22 does not affect the court's calculations. Each ground in the amended petition would need
23 to relate back to the original petition. Relation back, pursuant to Rule 15(c) of the Federal
24 Rules of Civil Procedure, is allowed "[s]o long as the original and amended petitions state
25 claims that are tied to a common core of operative facts . . ." *Mayle v. Felix*, 545 U.S.
26 644, 664 (2005). However, the original petition contained no claims and no allegations of
27 fact, and thus no common core of operative facts exist. The claims in the amended petition
28 must stand on their own, and on their own they are untimely.

1 Respondents also argue that all the claims in the amended petition are
 2 procedurally defaulted.² The three grounds that petitioner presents in the amended
 3 petition (ECF No. 5) are grounds that he presented in his state habeas corpus petition
 4 and in a supplement to that petition. (Exh. 77 (ECF No. 13-18); Exh. 80 (ECF No. 13-21).)
 5 The state district court ruled that the state habeas corpus petition was untimely under
 6 Nev. Rev. Stat. § 34.726(1). (Exh. 87 (ECF No. 14-7).) Petitioner did not appeal that
 7 decision, and it is final, for the reasons explained above in the Court's discussion on
 8 timeliness.

9 A federal court will not review a claim for habeas corpus relief if the decision of the
 10 state court regarding that claim rested on a state-law ground that is independent of the
 11 federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S.
 12 722, 730-31 (1991).

13 In all cases in which a state prisoner has defaulted his federal claims in state
 14 court pursuant to an independent and adequate state procedural rule,
 15 federal habeas review of the claims is barred unless the prisoner can
 16 demonstrate cause for the default and actual prejudice as a result of the
 17 alleged violation of federal law, or demonstrate that failure to consider the
 18 claims will result in a fundamental miscarriage of justice.

19 *Id.* at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The ground for dismissal
 20 upon which the state district court relied in this case is an adequate and independent
 21 state rule. *Loveland v. Hatcher*, 231 F.3d 640 (9th Cir. 2000); *Moran v. McDaniel*, 80 F.3d
 22 1261 (9th Cir. 1996).

23 All claims in the amended petition are procedurally defaulted by the state district
 24 court's dismissal of the state habeas corpus petition as untimely. By not filing a response
 25 to the motion to dismiss, petitioner has demonstrated neither cause nor prejudice. The
 26 Court thus will not consider whether cause and prejudice exist to excuse the procedural
 27 default.

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²The Court is addressing respondents' arguments out of the order of presentation.

1 Respondents also argue that petitioner has not exhausted all three claims in the
 2 amended petition because he did not appeal the denial of his state habeas corpus
 3 petition. Before a federal court may consider a petition for a writ of habeas corpus, the
 4 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To
 5 exhaust a ground for relief, a petitioner must fairly present that ground to the state's
 6 highest court, describing the operative facts and legal theory, and give that court the
 7 opportunity to address and resolve the ground. See *Duncan v. Henry*, 513 U.S. 364, 365
 8 (1995) (*per curiam*); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

9 Respondents technically are correct. However, petitioner's failure to appeal the
 10 decision of the state district court also has made final a decision that the state habeas
 11 corpus petition is untimely, and thus the claims in the amended petition are procedurally
 12 defaulted.

13 To appeal the dismissal of the amended petition, petitioner must obtain a certificate
 14 of appealability, after making a "substantial showing of the denial of a constitutional right."
 15 28 U.S.C. §2253(c).

16 Where a district court has rejected the constitutional claims on the merits,
 17 the showing required to satisfy §2253(c) is straightforward: The petitioner
 18 must demonstrate that reasonable jurists would find the district court's
 19 assessment of the constitutional claims debatable or wrong. The issue
 20 becomes somewhat more complicated where, as here, the district court
 21 dismisses the petition based on procedural grounds. We hold as follows:
 22 When the district court denies a habeas petition on procedural grounds
 23 without reaching the prisoner's underlying constitutional claim, a COA
 24 should issue when the prisoner shows, at least, that jurists of reason would
 25 find it debatable whether the petition states a valid claim of the denial of a
 26 constitutional right and that jurists of reason would find it debatable whether
 27 the district court was correct in its procedural ruling.
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23 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
 24 1077-79 (9th Cir. 2000).

25 In ground 1, petitioner claims that counsel provided ineffective assistance because
 26 counsel did not object to the imposition of an equal and consecutive sentence for the use
 27 of a deadly weapon, under Nev. Rev. Stat. § 193.165, because the court did not consider
 28 the factors required by that statute. Petitioner and the prosecution negotiated a plea

1 agreement that included a prison sentence of four (4) years to ten (10) years for voluntary
2 manslaughter, plus a consecutive prison sentence of four (4) years to ten (10) years for
3 the deadly-weapon enhancement. (Exh. 70 (ECF No. 13-11).) The state district court
4 imposed sentence accordingly. (Exh. 72 (ECF No. 13-13).) Petitioner cannot demonstrate
5 prejudice for counsel's failure to object to a sentence to which petitioner himself already
6 had agreed. Ground 1 does not state a valid claim of the denial of a constitutional right,
7 and reasonable jurists would not disagree with this determination.

8 In ground 2, petitioner claims that counsel provided ineffective assistance because
9 counsel did not file a direct appeal, in which petitioner could have challenged the
10 imposition of the deadly-weapon sentence. Without knowing more, the court cannot state
11 that petitioner has not presented a valid claim of the denial of a constitutional right.

12 In ground 3, petitioner claims that counsel provided ineffective assistance because
13 counsel did not challenge the validity of the Nevada Revised Statutes based upon a
14 violation of the doctrine of the separation of powers. On January 25, 1957, the Nevada
15 Legislature duly enacted the Nevada Revised Statutes as the laws of Nevada. 1957 Nev.
16 Stat. 1-4. Furthermore, the Nevada Legislature has since amended the laws governing
17 voluntary manslaughter, Nev. Rev. Stat. §§ 200.040, 200.050, and 200.080, and the law
18 governing the use of a deadly weapon, Nev. Rev. Stat. § 193.165, after the enactment of
19 the Nevada Revised Statutes. Ground 3 does not state a valid claim of the denial of a
20 constitutional right, and reasonable jurists would not disagree with this determination.

21 Reasonable jurists would not find the Court's conclusions on its procedural rulings,
22 both timeliness and procedural default, to be debatable or wrong. Even if ground 2 could
23 state a valid claim of the denial of a constitutional right, the court will not issue a certificate
24 of appealability.

25 Petitioner has filed a motion for appointment of counsel. (ECF No. 18.) The Court
26 denies this motion because the Court is dismissing the action.

27 It is therefore ordered that petitioner's motion for appointment of counsel (ECF No.
28 18) is denied.

1 It is further ordered that respondents' motion to dismiss (ECF No. 7) is granted.
2 This amended petition for a writ of habeas corpus (ECF No. 5) is dismissed with prejudice
3 because it is untimely and procedurally defaulted. The Clerk of the Court will enter
4 judgment accordingly and close this action.

5 It is further ordered that a certificate of appealability is denied.

6 DATED THIS 15th day of December 2016.

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9 MIRANDA M. DU
10 UNITED STATES DISTRICT JUDGE
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